A

MOHAMAD ZUBIR MUSTAFA

v.

PP

B

HIGH COURT MALAYA, ALOR STAR
ZAMANI RAHIM JC
[CRIMINAL APPEAL NO: 42-27-2006]
30 SEPTEMBER 2009

C ***CRIMINAL PROCEDURE:*** *Appeal - Conviction and sentence, against - No grounds of judgment prepared - Whether High Court to proceed by way of revision - Whether conviction and sentence ought to be set aside*

CRIMINAL PROCEDURE: *Judgment - Grounds of judgment - Non delivery of - Notes of evidence and/or proceedings, reference to - Whether* D *appellate court's task to evaluate and examine decision made impeded in any way*

The appellant was convicted of an offence under s. 165 of the Penal Code in the Sessions Court after a full trial. He was E sentenced to six months' imprisonment from the date of conviction and to a fine of RM5,000 in default six months' imprisonment. He appealed against conviction and sentence. However, the grounds of judgment had not been prepared. The Sessions Court judge who heard the matter had been suspended from work and prevented from F writing the judgment. Nevertheless, the appellant compiled the record of appeal and transmitted it to the High Court, but without the grounds of judgment. In the High Court, counsel for the appellant urged the judge to set aside the conviction and sentence but conversely, the DPP urged the court not to disturb the conviction and sentence.

G

Held (dismissing the appeal and maintaining the conviction and sentence):

(1) In the instant case, since there was no proper appeal due to the H absence of the grounds of decision, the High Court would proceed by way of revision under Chapter XXXI of the CPC. *Azman Jamhuri v. PP* (foll); *Rodiah Sitam v. PP* (foll). (para 15)

(2) A perusal of the notes of proceedings showed that the Sessions Court judge had in fact undertaken a maximum evaluation of I the prosecution's evidence at the close of the prosecution's case and found that the essential ingredients of the offence under

s. 165 of the Penal Code had been established, and the presumption under s. 42(3) of the Anti-Corruption Act 1997 applicable. A *prima facie* case had been made out and the appellant's defence had been rightly called. (paras 17 & 18)

(3) The Sessions Court judge had also evaluated and considered both the prosecution and the defence evidence and found that the defence had failed to cast any reasonable doubt on the prosecution's case, and had also failed to rebut on a balance of probabilities the presumption under s. 42(3) of the Anti-Corruption Act 1997. The appellant's defence was in fact a bare denial. (para 20)

(4) The Sessions Court judge had also considered the mitigating and other relevant factors before imposing sentence. The High Court could not detect any error made by the Sessions Court judge both in law and in fact. The non-delivery of grounds of judgment in the instant case in no way impeded the High Court's task to evaluate and examine the decision made by the Sessions Court judge. The decision of the Sessions Court should therefore be affirmed. (paras 21 & 22)

Case(s) referred to:
Azman Jamhuri v. PP [2001] 1 CLJ 539 HC ***(foll)***
DA Duncan v. PP [1980] 1 LNS 12 FC ***(refd)***
Jaafar Abu & Anor v. PP [1988] 2 CLJ 595; [1988] 1 CLJ (Rep) 142 SC ***(refd)***
PP v. Rosman Abdul Wahab [2006] 4 CLJ 615 HC ***(refd)***
Rodiah Sitam v. PP [2009] 7 AMR 728 ***(foll)***

Legislation referred to:
Anti-Corruption Act 1997, ss. 2, 42(3)
Courts of Judicature Act 1964, s. 66(1)
Criminal Procedure Code, ss. 307, 308, 325
Penal Code, ss. 165, 185, 409
Prevention of Corruption Act 1961, s. 4(a)

For the appellant - G Ravishankar; M/s R Shankar Gandhi & Assoc
For the respondent - Saiful Hazmi Mohd Saad DPP

Reported by Andrew Christopher Simon

A

JUDGMENT

Zamani Rahim JC:

[1] The appellant was a pensioner since 3 February 2005. His last post before retirement was Pengarah Maktab Perguruan Pulau B Pinang. Before that, he was Ketua Sektor Pengurusan dan Perkhidmatan, Jabatan Pendidikan Negeri Kedah. The appellant was charged at the Sessions Court, Alor Star with an offence under s. 165 of the Penal Code. The trial commenced on 12 January 2004 and concluded on 28 September 2006, a period stretched for almost C three (3) years, wherein he was found guilty, convicted and sentenced to six (6) months imprisonment from the date of conviction and a fine of RM5,000 in default six (6) months imprisonment.

D **[2]** Upon conviction, the appellant wasted no time, as on the same day he lodged an appeal pursuant to s. 307 of the Criminal Procedure Code (CPC) against conviction and sentence. An application for stay of execution of the sentence was granted pending appeal.

E **[3]** The next course of action is for the court appealed from to serve the grounds of decision to the appellant or his advocate. Within ten (10) days after the service of the grounds of decision, the appellant shall lodge a petition of appeal addressed to the High Court. Having complied with the provisions of s. 307 CPC, the F court appealed from shall transmit to the High Court, pursuant to s. 308 CPC, the record of appeal which consist a copy each of:

a) the record of the proceedings;

b) the grounds of decision;

G

c) the notice of appeal; and

d) the petition of appeal.

[4] On 21 January 2009 I have fixed case management for H criminal cases, when I was informed by the learned counsel that he had yet to receive the grounds of decision and the notes of proceeding. On my instruction, my senior assistant registrar had enquired from the Sessions Court Alor Star, the court appealed from, about the record of appeal. The Sessions Court Alor Star was I in a quandary as the grounds of judgment was not prepared or written by the learned trial judge, who heard and delivered the decision in this case. By a letter dated 27 November 2008 the

current Senior Sessions judge, Alor Star sought the view of our Chief Justice of Malaya (CJM), who by his letter dated 11 December 2008, replied that the trial judge in question was interdicted from performing her duty in accordance with Peraturan 44, Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 and she was thus, legally incapacitated to write the grounds of judgment at the moment. The CJM had directed to proceed with the appeal and prepared the appeal record without the grounds of judgment. The CJM's letter dated 11 December 2008 is now reproduced hereunder:

A

B

C

11 Disember 2008

Puan Hajjah Maznah binti Abdul Aziz,
Hakim Kanan,
Mahkamah Sesyen Alor Star,
Jalan Suka Menanti,
05150 Alor Star,
Kedah Darul Aman.

D

Puan,

Mahkamah Sesyen Alor Star
Kes Tangkap No: 61-01-03
Rayuan Jenayah Mahkamah Tinggi No: 42-27-06
Muhamad Zubir b. Mustafa lwn. Pendakwa Raya

E

Adalah saya merujuk kepada perkara di atas dan juga surat puan bertarikh 27.11.2008.

F

2. Memandangkan Hakim Mahkamah Sesyen yang membuat keputusan iaitu Puan Zunaidah bt. Mohd. Idris telah **ditahan kerja** menurut Peraturan 44, Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993, maka beliau tidak berkelayakan untuk menulis alasan penghakiman tersebut buat masa ini.

G

3. Sehubungan dengan itu, **rayuan tersebut bolehlah diteruskan dan rekod rayuan hendaklah disediakan tanpa alasan penghakiman tersebut.**

Sekian, terima kasih.

H

Yang ikhlas,

... t.t ...

(Dato' Arifin bin Zakaria)
Hakim Besar Malaya.

I

[5] Accordingly, the record of appeal was prepared and transmitted to the High Court. As directed, the record of appeal was compiled, of course without the grounds of decision. The CJM's aforesaid letter was incorporated at p. 7 in the record of appeal to explain the absence of the grounds of appeal. As the notice of appeal was filed on 28 September 2006, almost three (3) years ago, I propose to dispose of this appeal as soon as possible. Delay in disposing cases, be it criminal or civil, is a judicial disease that every now and then, bugs the administration of justice. It demands immediate eradication. A negative public perception of judicial incompetence and inefficiency must be erased from the public mind. Bear in mind an often cited maxim – 'justice delayed is justice denied'. To expedite the matter, I had directed the appellant's and prosecution's counsels alike to assist the court to submit their respective submissions with relevant case laws on the subject of non-availability of the written grounds of decision during the appeal. The learned counsel for the appellant and the learned deputy had responded to my direction and both of them had since forwarded their respective submissions. The learned counsel urged me to set aside the conviction and sentence imposed on the appellant relying on decision of Ian HC Chin J in *Azman Jamhuri v. PP* [2001] 1 CLJ 539. On the other hand, the learned deputy requested me not to disturb the conviction and sentence based on the Supreme Court case of *Jaafar Abu & Anor v. PP* [1988] 2 CLJ 595; [1988] 1 CLJ (Rep) 142. The facts in *Jaafar Abu & Anor* are these. The two applicants with another person were charged and convicted under s. 4(a) of Prevention of Corruption Act 1961 and were sentenced to three (3) months imprisonment and one (1) month imprisonment respectively. They appealed against sentence. There was no written judgment by the learned President of the Sessions Court as he had left the service. The High Court on appeal dismissed the appeal and affirmed the conviction and sentence.

[6] The applicant applied pursuant to s. 66(1) of the Courts of Judicature Act 1964 for a determination of the following questions:

1) When there is an appeal pending and no grounds of judgment available can the High Court act in the revision.

2) If the answer yes, what is the proper order the judge should make.

[7] It would appear that the learned High Court judge treated the case on revision. Lee Hun Hoe CJ (Borneo) who delivered the Supreme Court judgment held as follows:

1) There was no doubt that the High Court in hearing an appeal can proceed to exercise its power of revision and that the High Court judge in the instant case had complete jurisdiction to do as he did.

2) That if the learned judge has complete jurisdiction then he is entitled to make such orders as he deems fit in the circumstances. Sentences of the applicants to be carried out forthwith.

[8] The Supreme Court did not interfere with the High Court decision and confirmed the convictions and sentences. The applicants appeal was dismissed.

[9] In *Azman Jamhuri*'s case, *supra*, the facts are these. The accused appealed against conviction and sentence by the Sessions Court judge on two charges of possession of cannabis. The appeal record, however, did not contain a copy of the grounds as required under s. 308 CPC. The learned deputy urged the court to adjourn the instant appeal to enable the Sessions judge to write his grounds of decision or alternatively, to deal with the matter on revision. Ian HC Chin J took the stand that the case was to proceed by way of revision. At p. 545, His Lordship said:

> In my view, it does not really matter whether you act as if the case is under appeal or in revision; it calls for the same consideration which I will refer to later. I prefer to deal with the present case in revision since there are no grounds of decision and s. 308 had not been complied with.

[10] Having evaluated both the prosecution case and defence case, Ian HC Chin J was of the view that the accused's conviction was not safe. In the exercise of His Lordship's revisionary powers, the conviction and sentence was set aside.

[11] In another recent case of *Rodiah bte Sitam v. PP* [2009] 7 AMR 728 after a full trial, the appellant was found guilty on two charges – the first charge an offence of criminal breach of trust under s. 409 of the Penal Code where she was sentenced to three (3) years imprisonment and the second charge an offence of giving false information to a public servant under s. 185 of the Penal Code where she was sentenced to three (3) months imprisonment. The sentences were to run concurrently. Hence the appeal against the convictions and sentences. At the close of the prosecution case, the defence elected not to submit and the learned Sessions Court judge decided that as the accused did not submit no case to answer, he found that the prosecution has made out a *prima facie* case against the accused.

A The appellant's defence was called. At the hearing of the appeal before the High Court, 13 years had lapsed and no grounds was written or made available. Linton Albert J who delivered the judgment observed at para 6 p. 732 as follows:

> B The failure of accused person to submit a no case to answer at the close of the case for the prosecution whether or not represented by counsel, cannot short-circuit the fundamental requirement that at the end of the case for the prosecution the trial judge must judicially evaluate the evidence adduced before concluding that the prosecution has sufficiently established its case and calling upon the accused to C enter upon his defence. The automatic finding of a case to answer by sheer default based on a purported admission is repugnant to the fundamental requirements of our criminal justice system. In *Looi Kow Chai & Anor v. PP* [2003] 2 AMR 89; [2003] 2 MLJ 65, Gopal Sri Ram JCA, delivering the judgment of the Court of Appeal said at p. 104 (AMR); p. 81 (MLJ):
>
> D
>
> > It therefore follows that there is only one exercise that a judge sitting alone under s. 180 of the CPC has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and to ask himself the question: if I decide to call upon the accused to enter his E defence and he elects to remain silent, am I prepared to convict him on the totally of the evidence contained in the prosecution case? If the answer is in the negative then no *prima facie* case has been made out and the accused would be entitled to an acquittal.

F **[12]** At para 8 p. 733, His Lordship confirmed that:

> The failure of the learned Sessions Court judge to conduct a maximum evaluation of all the evidence adduced by the prosecution at the conclusion of its case was therefore a serious misdirection which had caused a miscarriage of justice.

G

[13] Following *Azman Jamhuri, supra*, by way of revision, His Lordship reversed the appellant's convictions on the first and second charge and sentences set aside. The appellant was accordingly acquitted and discharged. No order of retrial was made as the case was very long outstanding due to inexcusable delay.

H

[14] To recap, in the case of *Jaafar Abu & Anor, supra*, the appeal was against sentence where the High Court and similarly the Supreme Court made concurrent decisions to dismiss the appeal and affirmed the conviction and sentence. Whilst in *Azman Jamhuri,* I *supra*, and *Rodiah bte Sitam, supra*, in exercising the powers of revision, the convictions and sentences were set aside. All the three decided cases aforesaid had a common denominator in that, they were decided without the benefit of the grounds of decision.

[15] In this case, as there was no proper appeal before me in the absence of the grounds of decision contrary to s. 308 CPC, and I propose to follow the case of *Azman Jamhuri* and *Rodiah bte Sitam, supra* to deal this appeal by way of revision under Chapter XXXI CPC.

[16] Having perused the appeal record, the notes of proceedings showed that the prosecution closed its case on 23 February 2006, followed by submissions of both the prosecution and defence. The case was adjourned to 13 March 2006 where the learned Sessions Court judge delivered her decision as follows:

Tarikh: 13.3.2006

TPR: Encik Abdul Ghani

Peg OKT: Encik Hizeri

Untuk Keputusan: Kes Pendakwaan

Setelah meneliti hujahan serta keterangan saksi Pendakwaan, Mahkamah berpuas hati bahawa pihak Pendakwaan telah berjaya membuktikan kes *prima facie* terhadap OKT ini.

a) OKT adalah seorang penjawat awam – OKT bertugas sebagai Ketua Sektor Pengurusan Perkhidmatan Pendidikan di Jabatan Pendidikan Negeri Kedah.

b) OKT pada 30.12.2000 telah menerima satu barang berharga bila mana Encik Mohamad Suhaimi bin Othman (SP1) telah membiayai kos makanan bagi majlis perkahwinan anak perempuan OKT.

c) OKT menerima barang berharga itu tanpa apa-apa balasan. Encik Mohamad Suhaimi bin Othman (SP1) telah menjelaskan kos makanan dalam 2 bayaran iaitu pada 16.12.2000 sejumlah RM2,000.00 dan 25.12.2000 sejumlah RM2,500.00 kepada Pak Lah, caterer yang sediakan makanan bagi majlis perkahwinan anak perempuan OKT. Bayaran-bayaran tersebut telah tidak dibayar balik oleh OKT melainkan setelah siasatan kes ini dijalankan.

d) OKT mengetahui bahawa pemberi barang tersebut mempunyai hubungan atau kaitan dengan tugas rasmi OKT. Dalam kes ini, Encik Mohamad Suhaimi merupakan seorang kontraktor yang menjalankan kerja-kerja selenggara di sekolah-sekolah menengah bernilai RM 20,000.00 ke bawah, di mana kerja-kerja tersebut berada dalam pengurusan Jabatan Pendidikan Negeri Kedah, dilaksanakan pada tahun 2000.

Ciri-ciri yang diperlukan bagi Perkhidmatan di bawah seksyen 165 Kanun Keseksaan telah berjaya dibuktikan.

Seksyen 42(3) Akta Pencegahan Rasuah 1997 ie, anggapannya terpakai terhadap OKT.

Dengan ini OKT dipanggil untuk membela diri.

Tarikh sambung bicara: 8 & 9 Mei 2006

Jaminan dilanjutkan.

t.t
(Zunaidah bt Mohd Idris)
13/3/06

[17] It can be seen that it would be an unfair accusation that no grounds of decision was given by the learned Sessions Court judge. The contemporaneous record in the notes of proceeding at pp. 168 and 169 of the appeal record showed that, upon maximum or a full evaluation of the evidence of the prosecution witnesses which necessarily include the credibilities of SP1, SP2 (wedding caterer) and the parties submissions, the learned Sessions Court judge was satisfied and had made a finding, at the close of the prosecution case that, all the essential ingredients of the offence under s. 165 of the Penal Code (a prescribed offence under s. 2 of the Anti-Corruption Act 1997) had been established. And therefore, the presumption under s. 42 (3) had been raised against the accused: see judgment of Low Hop Bing J (as he then was) in *PP v. Rosman Abdul Wahab* [2006] 4 CLJ 615.

[18] In the circumstances of this case, the credibility of SP1, a key witness for the prosecution played a minimal part in determining a *prima facie* case by the trial judge in arriving at her conclusion at the close of the prosecution case. There were other overwhelming evidence against the accused, that is, the testimony of an independent witness, SP2, and documentary evidences P2A, P3A, P5A, P9A and P14. In consequent, a *prima facie* had been made out against the accused and his defence was rightly called.

[19] Having called the defence, the accused elected to give his evidence on oath. After his defence, the accused proposed to call one Abdullah bin Yunus, Ketua Sektor Kemanusiaan, Jabatan Pendidikan Negeri Kedah. The case was put to 27 July 2006 wherein the court was informed by the learned counsel that no more witnesses would be called. That means to say only the

accused testified for the defence. The defence closed its case. On 28 September 2006, the learned Sessions Court judge delivered her decision as follows:

> Setelah meneliti keterangan saksi-saksi Pendakwaan dan saksi Pembelaan dan setelah mempertimbangkan hujahan Pendakwaan dan Peguambela OKT, Mahkamah berpuas hati bahawa pihak Pembelaan telah gagal membangkitkan apa-apa keraguan yang munasabah terhadap kes pendakwaan.
>
> Pihak Pendakwaan telah berjaya membuktikan kes menjangkau apa-apa keraguan yang munasabah (beyond reasonable doubt) terhadap OKT sebagaimana terkandung dalam pertuduhan.
>
> Mahkamah mensabitkan OKT terhadap pertuduhan tersebut.
>
> t.t
>
> (Zunaidah bt Mohd Idris)
> 28/9/06.

[20] The learned Session Court judge, at p. 199 of the appeal record, had obviously evaluated and considered both the evidence tendered by the prosecution and the defence, and ruled that the defence had failed to cast any reasonable doubt on the prosecution case and also failed to rebut on the balance of probability the presumption under s. 42(3). In his defence, the accused denied that he had official relation with SP1; denied that he awarded the contract to SP1; denied that he invited SP1 ho his daughter's wedding reception on 30 December 2000; denied that he requested SP1 to pay for the wedding expenses and denied having said to SP1 "you bayar ini" (see appeal record at p. 175-178). The accused defence was, therefore a bare denial: see *D.A Duncan v. PP* [1980] 1 LNS 12 FC. As a result, the prosecution had successfully proved its case beyond reasonable doubt. The accused was found guilty and convicted as charged.

[21] On mitigation and taken into account the following factors, *inter alia*, the accused was a public officer; the offence was committed while he was in service; the accused did make the repayment, though after the BPR action had commenced; the accused was a first offender and the public interest demanded that public officers must be clean and free from graft, the accused was sentenced to six (6) months imprisonment from the date of conviction and a fine of RM5,000, in default six (6) months imprisonment.

A **[22]** In the light of the above, I do not detect any error made by the learned Sessions Court judge both in law and in facts. The non-delivery of grounds of judgment in this case has not in any way impeded my task to evaluate and examine the decision made by the learned Sessions Court judge. In pursuant of my revisionary powers
B under s. 325 CPC, I hereby affirmed the decision of the court below. The accused's appeal is accordingly dismissed.

C

D

E

F

G

H

I